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8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA
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12 GLOBAL APOGEE, a Wyoming) CV 18-5162-RSWL-E
13 Corporation)
14 Plaintiff,) ORDER re: Defendant's
15 v.) Motion to Dismiss [9]
16)
17 SUGARFINA, INC., a Delaware)
18 Corporation, JOSHUA)
19 REZNICK, an individual,)
ROSIE O'NEILL, an)
individual, DOES 1-10 and)
UNKNOWN ENTITIES 1-10,)

20 Defendants.
21

22 Currently before the Court is Defendant Sugarfina,
23 Inc.'s ("Defendant") Motion to Dismiss ("Motion") [9].
24 Having reviewed all papers submitted pertaining to this
25 Motion, the Court **NOW FINDS AND RULES AS FOLLOWS:** the
26 Court **GRANTS in part** and **DENIES in part** Defendant's
27 Motion.
28

I. BACKGROUND

A. Factual Background

Plaintiff is the holder of the registered "CANDY-GRAM" trademark ("CANDY-GRAM"), No. 1,943,440. Compl. ¶ 15, ECF No. 1. The registration covers "Candy" in Class 30 and "Greeting Cards" in Class 16. Id. Plaintiff has used CANDY-GRAM continuously in interstate commerce in connection with the sales of candy and greeting cards since it was issued in 1995, and has renewed it every ten years. Id. ¶ 17. Plaintiff uses CANDY-GRAM on its website, www.candygram.com, and in its 800-candygram toll number. Id. ¶ 18.

Defendant is a luxury candy boutique. Id. ¶ 9. Defendant's website features the option "Candygram," which allows customers to send candy products with messages through their website and in-store kiosks. Id. ¶¶ 26-27. Plaintiff contends that no later than February 2018, Defendant began infringing on Plaintiff's CANDY-GRAM mark as well as its common law rights to the CANDY-GRAM service mark. Id. ¶ 2.

Plaintiff sent a cease and desist letter to Defendant on April 26, 2018, regarding Defendant's alleged trademark infringement, but Defendant has refused to comply with the request. Id. ¶¶ 19-20.

B. Procedural Background

On June 11, 2018, Plaintiff filed its Complaint [1]

1 against Defendant, among others,¹ alleging the following
2 claims:

- 3 1) Federal Trademark Infringement
- 4 2) Federal Trademark Dilution
- 5 3) Unfair Competition, Trade Dress Infringement,
6 and False Designation of Origin
- 7 4) California Common Law Unfair Competition
- 8 5) Unfair Competition under Cal. Bus. & Prof. Code
- 9 6) Common Law Infringement of Trademark
- 10 7) Common Law Infringement of Service Mark
- 11 8) Intentional Interference with Prospective
12 Business Relationship
- 13 9) Unjust Enrichment

14
15 On July 31, 2018, Defendant filed its Motion to
16 Dismiss [9]. Plaintiff timely opposed [12], and
17 Defendant timely replied [13].

18 II. DISCUSSION

19 A. Legal Standard

20 Federal Rule of Civil Procedure 12(b)(6) allows a
21 party to move for dismissal of one or more claims if
22 the pleading fails to state a claim upon which relief
23 can be granted. A complaint must "contain sufficient
24 factual matter, accepted as true, to state a claim to
25 relief that is plausible on its face." Ashcroft v.

26
27 ¹ Plaintiff is also suing the following Defendants not
28 parties to this Motion: co-founders and co-CEOs of Sugarfina,
Joshua Teznik and Rosie O'Neill; Does 1-10; and Unknown Entities
1-10. Compl. ¶¶ 10-11, 13-14.

1 Iqbal, 556 U.S. 662, 678 (2009)(quotation omitted).
2 Dismissal is warranted for a "lack of a cognizable
3 legal theory or the absence of sufficient facts alleged
4 under a cognizable legal theory." Balistreri v.
5 Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir.
6 1988)(citation omitted).

7 In ruling on a 12(b)(6) motion, a court may
8 generally consider only allegations contained in the
9 pleadings, exhibits attached to the complaint, and
10 matters properly subject to judicial notice. Swartz v.
11 KPMG LLP, 476 F.3d 756, 763 (9th Cir. 2007). A court
12 must presume all factual allegations of the complaint
13 to be true and draw all reasonable inferences in favor
14 of the non-moving party. Klarfeld v. United States,
15 944 F.2d 583, 585 (9th Cir. 1991). The question is not
16 whether the plaintiff will ultimately prevail, but
17 whether the plaintiff is entitled to present evidence
18 to support the claims. Jackson v. Birmingham Bd. of
19 Educ., 544 U.S. 167, 184 (2005) (quoting Scheuer v.
20 Rhodes, 416 U.S. 232, 236 (1974)). While a complaint
21 need not contain detailed factual allegations, a
22 plaintiff must provide more than "labels and
23 conclusions" or "a formulaic recitation of the elements
24 of a cause of action." Bell Atl. Corp. v. Twombly, 550
25 U.S. 544, 555 (2007). However, a complaint "should not
26 be dismissed under Rule 12(b)(6) 'unless it appears
27 beyond doubt that the plaintiff can prove no set of
28 facts in support of his claim which would entitle him

1 to relief.'" Balistreri, 901 F.2d at 699 (citing
2 Conley v. Gibson, 355 U.S. 41, 45-46 (1957)).

3 **B. Discussion**

4 1. Request for Judicial Notice

5 Defendant requests that the Court take judicial
6 notice of the following: (1) the United States Patent
7 and Trademark Office's ("USPTO") registration record of
8 CANDYGRAM; (2) the line, "Candygram for Mongo" in the
9 movie "Blazing Saddles," and references to "candygram"
10 in the Saturday Night Live skit, "Landshark"; (3)
11 articles extending back to the 1980's referencing the
12 term "candygram" in schools and organizations for
13 delivering candy with associated messages; and (4) the
14 Collins' Dictionary definition of "candygram." Def.'s
15 Req. for Judicial Notice, ECF No. 9-6.

16 Plaintiff does not object to Defendant's Request
17 for Judicial Notice. Moreover, each is appropriate for
18 judicial notice: (1) the trademark record of CANDYGRAM,
19 see Oroamerica Inc. v. D&W Jewelry Co., Inc., 10 Fed.
20 Appx. 516, 517 n.4 (9th Cir. 2001)(taking judicial
21 notice of USPTO trademark documents); (2) the lines in
22 "Blazing Saddles" and "Saturday Night Live" as content
23 of television shows or movies, see Weiss v. DreamWorks
24 SKG, No. CV 14-02890-DDP (AJWx), 2015 WL 12711658, at
25 *3-4 (C.D. Cal. Feb. 9, 2015)(taking judicial notice of
26 the content of a television show and screenplay); (3)
27 the articles as publications showing what information
28 was in the public realm at that time, see Von Saher v.

1 Norton Simon Museum of Art at Pasadena, 592 F.3d 954,
2 960 (9th Cir. 2010)(taking judicial notice of various
3 publications); and (4) the Collin's Dictionary
4 definition of "candygram," see Gonzalez v. Guzman, No.
5 17-cv-241-GPC-BGS, 2017 WL 5446087, at *6 n.4 (S.D.
6 Cal. Nov. 14, 2017)("Dictionary definitions are a
7 proper subject for judicial notice."). Thus, the Court
8 **GRANTS** Defendant's Request for Judicial Notice in its
9 entirety.

10 2. Motion to Dismiss

11 a. *Trademark Infringement*

12 To prevail on a trademark infringement claim under
13 the Lanham Act, a party "must prove: (1) that it has a
14 protectible ownership interest in the mark; and (2)
15 that the defendant's use of the mark is likely to cause
16 consumer confusion." Network Automation, Inc. v.
17 Advanced Sys. Concepts, 638 F.3d 1137, 1144 (9th Cir.
18 2011)(citation omitted). The Ninth Circuit considers
19 eight factors, termed the Sleekcraft factors, to
20 determine likelihood of confusion: (1) strength of the
21 mark; (2) proximity of the goods; (3) similarity of the
22 marks; (4) evidence of actual confusion; (5) marketing
23 channels used; (6) type of goods and the degree of care
24 likely to be exercised by the purchaser; (7)
25 defendant's intent in selecting the mark; and (8)

1 likelihood of expansion of the product lines.² AMF Inc.
2 v. Sleekcraft Boats, 599 F.2d 341 (9th Cir. 1979),
3 *abrogated in part on other grounds by* Mattel, Inc. v.
4 Walking Mountain Prods., 353 F.3d 792, 810 (9th Cir.
5 2003).

6 It is undisputed that Plaintiff has a valid
7 trademark registration for CANDY-GRAM. Compl. ¶ 15;
8 Reply at 12:19-20. Defendant does not contest the
9 validity of Plaintiff's trademark at this stage, but
10 rather argues that Plaintiff has not pleaded sufficient
11 facts showing a likelihood of confusion. A claim may
12 only be dismissed for failure to allege a likelihood of
13 confusion "if the court determines as a matter of law
14 from the pleadings that the goods are unrelated and
15 confusion is unlikely." Murray v. Cable Nat'l Broad
16 Co., 86 F.3d 858, 860 (9th Cir. 1996). However,
17 "[w]hether confusion is likely is a factual
18 determination woven into the law" that courts
19 "routinely treat . . . as [an issue] of fact" best left
20 to the jury. Wahoo Int'l, Inc. v. Phix Doctor, Inc.,
21 No. 13cv1395-GPC (BLM), 2014 WL 2864343, at *4 (S.D.
22 Cal. June 24, 2014)(quoting Levi Strauss & Co. v. Blue
23 Bell, Inc., 778 F.2d 1352, 1356 n.5 (9th Cir. 1985)).

25 ² The Sleekcraft factors are a non-exhaustive list and only
26 to be used as a guide. See, e.g., Fortune Dynamic, Inc. v.
27 Victoria's Secret Stores Brand Mgmt., Inc., 618 F.3d 1025, 1030
28 (9th Cir. 2010)("This eight-factor analysis is 'pliant,'
illustrative rather than exhaustive, and best understood as
simply providing helpful guideposts.").

1 See also Dita, Inc. v. Mendez, No. CV 10-6277 PSG
2 (FMOx), 2010 WL 5140855, at *5 (C.D. Cal. Dec. 14
3 2010)(finding arguments to dismiss for failure to
4 establish likelihood of confusion "premature on a
5 motion to dismiss").

6 While dismissal of pleadings on grounds that
7 likelihood of confusion is impossible from the face of
8 a complaint is not unprecedented, dismissal would be
9 "highly unusual" at this stage. Dita, 2010 WL 5140855,
10 at *5 (citations omitted). For example, of the few
11 instances where dismissal at this stage is appropriate,
12 the marks were obviously dissimilar. See, e.g., Mintz
13 v. Subaru of America, Inc., 716 Fed. Appx. 618, 620
14 (9th Cir. 2017)(dismissing infringement claims for
15 dissimilar marks "Share the Love" and "A World of Love,
16 for You and Those You Love"); Marvel Enters., Inc. v.
17 NCSOFT Corp., No. CV 04-9253-RGK, 2005 WL 878090, at *4
18 (C.D. Cal. Mar. 9, 2005)("That the terms at question
19 here [(the word mark STATESMAN and the registered mark
20 CAPTAIN AMERICA)] are entirely dissimilar is self-
21 evident.").

22 Here, Plaintiff alleged it registered CANDY-GRAM,
23 Compl. ¶ 15, providing a presumption of validity that
24 it is not a generic mark. See Coca-Cola Co. v.
25 Overland, Inc., 692 F.2d 1250, 1254 (9th Cir.
26 1982)("Federal registration of a trademark endows it
27 with a strong presumption of validity. . . [t]he
28 general presumption of validity resulting from federal

1 registration includes the specific presumption that the
2 trademark is not generic.")(citations omitted).
3 Plaintiff has also alleged Defendant's use of the very
4 same word "candygram," just without the hyphen or with
5 an email symbol in its place. Compl. ¶ 24. Though
6 Defendant includes "by Sugarfina," see id., it is
7 smaller in font size, and the term "candygram" is the
8 more conspicuous mark. See Sleekcraft, 599 F.2d at
9 351(finding the use of a housemark that is smaller and
10 skewed to one side less conspicuous in comparison to
11 the use of the mark, which serves to indicate the
12 source of origin to the public.) Further, both parties
13 use the terms for the delivery of candy coupled with a
14 message. Compl. ¶¶ 38, 42. While Plaintiff has not
15 alleged any facts that show evidence of actual
16 confusion, it is not required to establish likelihood
17 of confusion. See American Int'l Group, Inc. v.
18 American Int'l Bank, 926 F.2d 829 (9th Cir.
19 1991)(finding similarity of two companies providing
20 financial services sufficient for likelihood of
21 confusion). Because the parties use the same word in
22 connection with the same type of services, they are not
23 obviously dissimilar. Thus, it is premature to conduct
24 a likelihood of confusion analysis and the marks are
25 related enough to survive a dismissal at this stage.

26 Defendant argues its use of the mark amounts to a
27 classic fair use defense, which independently defeats
28 Plaintiff's trademark claim. To establish a classic

1 fair use defense, a defendant must prove: "(1)
2 Defendant's use of the term is not as a trademark or
3 service mark; (2) Defendant uses the term 'fairly and
4 in good faith'; and (3) [Defendant uses the term] 'only
5 to describe' its goods or services." 15 U.S.C. §
6 1115(b). However, "the classic fair use defense is not
7 available if there is a likelihood of consumer
8 confusion as to the origin of the product." Cairns v.
9 Franklin Mint Co., 292 F.3d 1139, 1151 (9th Cir. 2002).
10 Because the Court is not determining whether there is a
11 likelihood of confusion, it cannot determine whether
12 the classic fair use defense is available to
13 Defendants.

14 Given that likelihood of confusion is a question of
15 fact, these pleadings are sufficient to withstand a
16 motion to dismiss, and further analysis of the
17 individual Sleekcraft factors is premature at this
18 stage.³ Therefore, the Court **DENIES** Defendant's Motion
19

20 ³ The Court notes that in discussing likelihood of
21 confusion, Defendant largely cited to cases deciding the issue on
22 summary judgment, judgment as a matter of law, or preliminary
23 injunction. Defendant cites only a few cases dismissing on
24 12(b)(6) for failure to plead a likelihood of confusion.
25 Defendant first relies on Infostream Group Inc. v. Avid Life
26 Media Inc., No. CV 12-09315 DDP (AJWx), 2013 WL 6018030, at *3
27 (C.D. Cal. Nov. 12, 2013), but the court there dismissed the
28 claim relying on the fact that neither the ads or domain names
of the sites at issue contained reference to any protected mark.
Defendant also relies on Natural Alternatives Int'l, Inc. v.
Allmax Nutrition, Inc., 258 F. Supp. 3d 1170, 1179 (S.D. Cal.
2017), however the court there granted a defendants' motion to
dismiss because the plaintiff failed to allege that the
infringing products came from a source other than Plaintiff,

1 to Dismiss as to the trademark infringement claim.

2 b. *Trademark Dilution Under the Lanham Act*

3 To prevail on a dilution claim, "a plaintiff must
4 show that (1) the mark is famous and distinctive; (2)
5 the defendant is making use of the mark in commerce;
6 (3) the defendant's use began after the mark became
7 famous; and (4) the defendant's use of the mark is
8 likely to cause dilution by blurring⁴ or dilution by
9 tarnishment⁵." Jada Toys, Inc. v. Mattel, Inc., 518
10 F.3d 628, 634 (9th Cir. 2008).

11 Plaintiff must first allege sufficient facts to
12 state a plausible claim that its mark is "famous,"
13 i.e., "widely recognized by the general consuming
14 public of the United States as a designation of source
15 of the goods or services of the mark's owner." 25
16 U.S.C. § 1125(c)(2)(A). Here, Plaintiff states in
17 conclusory fashion that its mark is famous and
18 distinctive and had been used long before Defendant
19 began using the mark. Compl. ¶ 53. Plaintiff further
20 alleges, "based on the Global Apogee's advertising,
21 sales, and the popularity of its own conduct, the

22 _____
23 which is not being argued here.

24 ⁴ Dilution by blurring is "association arising from the
25 similarity between a mark or trade name and a famous mark that
26 impairs the distinctiveness of the famous mark." 15 U.S.C. §
1125(c)(2)(B).

27 ⁵ Dilution by tarnishment is "association arising from the
28 similarity between a mark or trade name and a famous mark that
harms the reputation of the famous mark." 15 U.S.C. §
1125(c)(2)(c).

1 CANDY-GRAM trademark has acquired secondary meaning and
2 distinctiveness so that the public associates the
3 trademark exclusively with Global Apogee." Id. ¶ 52.
4 Beyond these bare allegations, Plaintiff has not
5 pleaded facts showing its popularity and recognition
6 among the public. Without more, these allegations are
7 insufficient to support a plausible claim of famousness
8 for purposes of Plaintiff's dilution claim.

9 Moreover, Plaintiff's allegations are a mere
10 recitation of the elements. While Plaintiff does
11 assert that both parties use the Internet as a market
12 channel, Plaintiff does not allege any facts to support
13 a plausible claim that Defendant's use of the mark is
14 likely to cause dilution by blurring or tarnishment.
15 Plaintiff only alleges, "Defendants' use of the CANDY-
16 GRAM trademark, as Candygram, dilutes and/or is likely
17 to dilute the distinctive quality of that trademark and
18 to lessen the capacity of the CANDY-GRAM trademark to
19 identify and distinguish Global Apogee's goods." Id. ¶
20 58. Such conclusory allegations are insufficient, thus
21 the Court **GRANTS** Defendant's Motion to Dismiss as to
22 the trademark dilution claim.

23 c. *Unfair Competition, Trade Dress*

24 *Infringement, and False Designation*

25 Plaintiff styles its argument under this claim as
26 one for trade dress. To state a claim for trade dress
27 infringement, a plaintiff must allege that the trade
28 dress: "(1) is nonfunctional; (2) is either inherently

1 distinctive or has acquired a secondary meaning; and
2 (3) [defendant's product] is likely to be confused with
3 [plaintiff's] products by members of the consuming
4 public." Deckers Outdoor Corp. v. Fortune Dynamic,
5 Inc., No. CV 15-769 PSG (SSx), 2015 U.S. Dist. LEXIS
6 188274, at *7 (C.D. Cal. May 8, 2015)(quoting Int'l
7 Jensen, Inc. v. Metrosound U.S.A., Inc., 4 F.3d 819,
8 823 (9th Cir. 1993)).

9 Here, Plaintiff has not adequately pleaded trade
10 dress because Plaintiff does not even identify what the
11 alleged trade dress is, let alone provide a general
12 description of it. See Bryant v. Matvieshen, 904 F.
13 Supp. 2d 1034, 1046 (E.D. Cal. 2010)("In order to state
14 a trade dress claim for website design, [plaintiff]
15 needs to clearly define the specific elements that
16 constitute the trade dress; a general description of
17 the site is insufficient.")(citation omitted). Because
18 Defendant is not on notice of the alleged trade dress,
19 the Court **GRANTS** Defendant's motion to dismiss as to
20 this claim.

21 d. *California Unfair Competition, Common Law*
22 *Trademark and Service Mark Infringement*

23 Because Plaintiff has sufficiently alleged
24 trademark infringement under the Lanham Act, Plaintiff
25 has also sufficiently alleged its fourth claim for
26 California common law unfair competition, sixth claim
27 for common law trademark infringement, and seventh
28 claim for common law service mark infringement. See

1 Int'l Order of Job's Daughters v. Lindeburg & Co., 633
2 F.2d 912, 916 (9th Cir. 1980)("[F]ederal and state laws
3 regarding trademarks and related claims of unfair
4 competition are substantially congruent."); Grey v.
5 Campbell Soup Co., 650 F. Supp. 1166, 1173 (C.D. Cal.
6 1986)("The tests for infringement of a federally
7 registered mark under § 32(1), 15 U.S.C. § 1114(1),
8 infringement of a common law trademark, unfair
9 competition under § 43(a), 15 U.S.C. § 1125(a), and
10 common law unfair competition involving trademarks are
11 the same."). Accordingly, the Court **DENIES** Defendant's
12 Motion as to these three claims.

13 e. *Intentional Interference With Prospective*
14 *Economic Advantage*

15 The elements of intentional interference with
16 prospective economic advantage include:

17 (1) an economic relationship between the
18 plaintiff and some third party, with the
19 probability of future economic benefit to the
20 plaintiff; (2) the defendant's knowledge of the
21 relationship; (3) intentional acts on the part
22 of the defendant designed to disrupt the
23 relationship; (4) actual disruption of the
24 relationship; and (5) economic harm to the
25 plaintiff proximately caused by the acts of the
26 defendant.

27
28 Korea Supply Co. v. Lockheed Martin Corp., 63 P.3d 937,

1 950 (Cal. 2003). While Plaintiff adequately pleaded
2 that Defendant engaged in wrongful conduct, namely a
3 claim for trademark infringement, Plaintiff has not
4 sufficiently pleaded the remaining elements. Plaintiff
5 does not identify any specific relationship with which
6 Defendant interfered. Damabeh v. 7-Eleven, Inc., No.
7 5:12-CV-1739-LHK, 2013 WL 1915867, at *10 (C.D. Cal.
8 May 8, 2013)("[I]t is essential that the Plaintiff
9 allege facts showing that Defendant interfered with
10 Plaintiff's relationship with a particular
11 individual."). For this reason, the Court **GRANTS**
12 Defendant's Motion to Dismiss this claim.

13 f. *Unfair Competition Under Bus. & Prof. Code*
14 § 17200

15 California's UCL prohibits "any unlawful, unfair or
16 fraudulent business act or practice and unfair,
17 deceptive, untrue or misleading advertising." Cal.
18 Bus. & Prof. Code § 17200. An "unlawful" business
19 activity includes "anything that can properly be called
20 a business practice and that at the same time is
21 forbidden by the law." Barquis v. Merchants Collection
22 Ass'n, 496 P.2d 817, 830 (Cal. 1972). Because
23 Plaintiff has adequately pleaded sufficient facts to
24 survive a motion to dismiss for trademark infringement,
25 Plaintiff has also satisfied the "unlawful" prong of
26 California's UCL. Cleary v. News Corp., 30 F.3d 1255,
27 1262-63 (9th Cir. 1994)("Actions pursuant to state
28 common law claims of unfair competition and actions

1 pursuant to California Business and Professions Code §
2 17200 are substantially congruent to claims made under
3 the Lanham Act.") (internal quotations omitted).

4 Defendant argues that in cases between direct
5 competitors, Plaintiff is required to satisfy the
6 "unfair" prong as set forth in Cel-Tech Commc'ns, Inc.
7 v. Los Angeles Cellular Telephone Co., 973 P.2d 527
8 (Cal. 1999). Contrary to Defendant's argument,
9 satisfaction of the "unlawful" prong is sufficient and
10 Plaintiff does not also need to adequately allege the
11 other two prongs. See Cel-Tech Communications, Inc.,
12 973 P.2d at 540 ("Because Business and Professions Code
13 section 17200 is written in the disjunctive, it
14 establishes three varieties of unfair competition—acts
15 or practices which are unlawful, or unfair, or
16 fraudulent.")(citation omitted).

17 However, Plaintiff's request for damages is
18 inappropriate under the UCL. Plaintiff requests
19 injunctive relief as well as monetary damages pursuant
20 to 15 U.S.C. § 1117, including damages and profits in
21 an amount not less than \$5,000,000, treble damages,
22 attorneys' fees, costs, and pre-judgment interest. See
23 Compl. ¶90. The remedies available under the UCL are
24 limited to restitution and injunctive relief. See Cel-
25 Tech Commc'ns, 973 P.2d at 560 ("Plaintiffs may not
26 receive damages, much less *treble* damages, or attorneys
27 fees.")(citation omitted).

28 Plaintiff argues it is entitled to restitutionary

1 disgorgement for the money Plaintiff would have had
2 ownership interest over, but was usurped by Defendants.
3 See Korea Supply Co., 63 P.3d at 945 ("[I]n the context
4 of the UCL, 'restitution' is limited to monies given to
5 the defendant or benefits in which the plaintiff has an
6 ownership interest."). Plaintiff's argument is
7 unavailing. Restitutionary disgorgement is typified by
8 the situation where "the disgorged money or property
9 [came] from the prospective plaintiff in the first
10 instance," id. at 949, but the lost sales and profits
11 Plaintiff is claiming were never previously owned by
12 Plaintiff. Rather, the funds were redirected to
13 Defendant and never received by Plaintiff in the first
14 place. Thus, Plaintiff's request resembles a claim for
15 damages in the form of lost profits, which is not
16 permitted under the UCL. See Jensen Enters. v.
17 Oldcastle, Inc., No. C 06-00247 SI, 2006 WL 2583681, at
18 *8 (N.D. Cal. Sept. 7, 2006)(dismissing claim for
19 pleading lost sales and profits). Therefore the Court
20 **GRANTS** Defendant's Motion to Dismiss as to this claim.

21 g. *Unjust Enrichment*

22 Plaintiff's claim for unjust enrichment fails as a
23 legal theory because California does not recognize a
24 cause of action for unjust enrichment. See McVicar v.
25 Goodman Glob., Inc., 1 F. Supp. 3d 1044, 1059 (C.D.
26 Cal. 2014)("Courts consistently have held that unjust
27 enrichment is not a proper cause of action under
28 California law."); Melchior v. New Line Prods., Inc.,

1 131 Cal. Rptr. 2d 347 (Cal. Ct. App. 2003) ("The phrase
2 'Unjust Enrichment' does not describe a theory of
3 recovery, but an effect. . . ."). As such, the Court
4 **GRANTS** Defendant's Motion to Dismiss this claim.

5 h. *Leave to Amend*

6 A party may amend the complaint once "as a matter
7 of course" before a responsive pleading is served.
8 Fed. R. Civ. P. 15(a). After that, the "party may
9 amend the party's pleading only by leave of court or by
10 written consent of the adverse party and leave shall be
11 freely given when justice so requires." Id. Leave to
12 amend lies "within the sound discretion of the trial
13 court." United States v. Webb, 655 F.2d 977, 979 (9th
14 Cir. 1981). The Ninth Circuit has noted "on several
15 occasions . . . that the 'Supreme Court has instructed
16 the lower federal courts to heed carefully the command
17 of Rule 15(a), F[ed]. R. Civ. P., by freely granting
18 leave to amend when justice so requires.'" Gabrielson
19 v. Montgomery Ward & Co., 785 F.2d 762, 765 (9th Cir.
20 1986)(quoting Howey v. United States, 481 F.2d 1187,
21 1190 (9th Cir. 1973)). Here, Plaintiff has yet to file
22 an amended complaint. It is likely that Plaintiff will
23 be able to cure the factual deficiencies in these
24 claims upon amendment, with the exception of
25 Plaintiff's claim for unjust enrichment. Because
26 Plaintiff's unjust enrichment claim fails as a matter
27 of law, amendment would be futile. Therefore, the
28 Court **DENIES** leave to amend as to unjust enrichment,

1 and **GRANTS** leave to amend as to the remaining claims.

2 **III. CONCLUSION**

3 Based on the foregoing, the Court **GRANTS WITH 21**
4 **DAYS LEAVE TO AMEND** Defendant's Motion to Dismiss as to
5 the following claims: (1) trademark dilution; (2)unfair
6 competition, trade dress infringement, and false
7 designation; (3) intentional interference with
8 prospective economic advantage; and (4)California
9 unfair competition under Cal. Bus. & Prof. Code §
10 17200.

11 The Court **GRANTS WITHOUT LEAVE TO AMEND** Defendant's
12 Motion to Dismiss as to Plaintiff's claim for unjust
13 enrichment.

14 The Court **DENIES** Defendant's Motion to Dismiss as
15 to the following claims: (1) trademark infringement;
16 (2) California common law unfair competition; (3)
17 common law trademark infringement; and (4) service mark
18 infringement.

19
20 **IT IS SO ORDERED.**

21
22 DATED: October 10, 2018

s/ RONALD S.W. LEW

23 **HONORABLE RONALD S.W. LEW**
24 Senior U.S. District Judge
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27
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